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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

AARON LEE SOUTHERN,

Defendant and Appellant.

A154909

(Napa County
Super. Ct. No. CR183467)

Defendant Aaron Lee Southern appeals the judgment imposed following his plea of no contest to a charge of possession of methamphetamine with a prior serious or violent felony conviction (Health & Saf. Code, § 11377, subd. (a)), and to a special allegation of one such prior conviction (Pen. Code, § 667.5, subd. (b)), and to the imposition of a prison sentence of four years in accordance with his plea agreement. His attorney has submitted a brief in accord with *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) and has advised defendant of his right to submit a supplemental brief, which he has not done. This court's review of the record has disclosed no issues warranting further briefing.

A Napa County sheriff's deputy stopped Southern in May 2017 for two Vehicle Code infractions. Southern consented to a search of his truck and the deputy found 15.2 grams of methamphetamine, which Southern said was for his personal use. Southern had several prior felony convictions, two of which were for serious or violent felonies (Pen. Code, § 667, subd. (d)), including a 1995 conviction for attempted murder (Pen. Code, §§ 187, 664). The People charged him with a single count of felony

possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)), adding special allegations as to his prior convictions. He faced a maximum potential sentence of 25 years to life. (Pen Code, § 667, subd. (e)(2)(A)(ii) & (e)(2)(C)(iv)(IV).)

The parties reached a plea agreement in April 2018, and Southern executed a “plea form” in which he agreed to plead no contest to the violation of Health and Safety Code section 11377, to accept a midterm base sentence of two years’ imprisonment, and to admit the special allegation of a single prior violent felony conviction, which would double his sentence to four years (Pen. Code, § 667, subd. (e)(1)). In return, the People agreed not to pursue the allegations of other priors. Southern did not agree to waive his right to appeal, instead initialing a line on the plea form reading, “Appeal - I understand I have the right to appeal the judgment of the court by filing a notice of appeal . . . within 60 days of the day I am sentenced”

On April 25, 2018, in accord with the plea form, Southern pled no contest to the possession count and admitted one prior strike. The court accepted the plea bargain and confirmed that “the agreement is that defendant will get four years’ state prison: two years for count one, multiplied by two for the prior,” while noting that the probation office was “to address all other factors.” Neither the court nor the parties raised the topic of appeal rights.

At a June 14 sentencing hearing, the court denied probation, sentenced Southern to four years in state prison, awarded 33 days’ presentence custody credits, and imposed a \$1,200 restitution-fund fine, a \$40 court security fee, a \$30 conviction assessment, a \$205 criminal lab analysis fee, and a suspended \$1,200 parole revocation fine, while waiving several other fees. The court added, “And there is no appeal right. It has been waived here, is that right?” Both counsel incorrectly replied, “yes”; and the court stated, “Okay. You waived your right to appeal.”

Southern nonetheless filed a timely notice of appeal, accompanied by a request for a certificate of probable cause. He checked a box on the notice of appeal form indicating that he based the appeal “on the sentence or other matters occurring after the plea that do not affect the validity of the plea,” as well as a box indicating “[o]ther basis,” by which

he wrote, “sentencing, and sentencing enhancements.” In his request for a certificate of probable cause, he wrote, “I wish to challenge the legality of the sentence and inclusive enhancements.” After recounting the case’s history, he added, “I am not attempting to withdraw my plea. I wish to challenge the validity of the following: [¶] (1) Forcing the elevation to a felony to force a state prison sentence; [¶] (2) Enhancements used to double the sentence; [and] [¶] (3) Constitutionality of elevating a misdemeanor case, to a felony, to a 25 to life (potential sentence) if I fight through a trial.” Finally, he alleged that “sheriffs” had “advised [him] to admit guilt because the case was a misdemeanor under Prop 47,” adding that he “would never have admitted guilt” had he known that “the case would become more than a misdemeanor.”

The superior court denied Southern’s request for a certificate of probable cause,¹ and he did not petition this court for a writ of mandate to require the court to issue one. (See *People v. Castelan* (1995) 32 Cal.App.4th 1185, 1188 [“a trial court’s refusal to issue a certificate of probable cause is reviewable by writ of mandate”].) Accordingly, on this appeal we may consider only issues that fall outside the scope of the certificate requirement. (*In re Brown* (1973) 9 Cal.3d 679, 683, superseded on other ground as noted in *People v. Mendez* (1999) 19 Cal.4th 1084, 1103–1104.) On appeal from a judgment based on a plea of no contest, such issues are limited to the denial of a suppression motion and those that “arose after entry of the plea and do not affect the plea’s validity.” (Cal. Rules of Court, rule 8.304(b)(4)(A) & (B).)

After counsel submitted her *Wende* brief, we have reviewed the record on appeal and determined that it does not contain any arguable sentencing or other post-plea issues. Southern was represented by counsel throughout the proceedings, and the record reveals no issues that merit further briefing regarding the entry of his plea, the prison sentence imposed in accordance with the plea agreement, or the fines, presentence credits, and

¹ The record on appeal does not include any documents post-dating the notice of appeal and request for a certificate, and thus does not include an order denying the request. However, defense counsel’s *Wende* brief states that the trial court denied the request, and Southern has not filed a separate brief to dispute that contention.

other matters addressed at the sentencing hearing. The trial court’s misunderstanding that Southern had waived his right to appeal—when in fact his plea form expressly preserved that right—was self-evidently harmless, as it did not deter Southern from filing a notice of appeal.

Although Southern did not file a supplemental brief attempting to set forth arguable issues outside the scope of the certificate requirement, his request for a certificate did list the grounds on which he “wish[ed] to challenge the legality of” his sentence—in essence, the use of his prior felony convictions to make his possession of a small quantity of drugs a felony, and expose him to a potential sentence of 25 years to life. If, as in this case, a defendant “does not purport to challenge the validity of his no contest plea,” yet nonetheless “seeks to appeal the constitutionality of the sentence to which he agreed as part of the negotiated plea bargain,” then the “critical inquiry” is “whether a challenge to the sentence is *in substance* a challenge to the validity of the plea, thus rendering the appeal subject to the [certificate] requirements of [Penal Code] section 1237.5.” (*People v. Panizzon* (1996) 13 Cal.4th 68, 76.) Southern agreed to plead no contest to a felony count of possession (Health & Saf. Code, § 11377, subd. (a)) and agreed that the two-year midterm sentence would be doubled based on the prior violent-felony enhancement. His challenge to the sentence imposed in accord with his plea bargain is in substance a challenge to the validity of his plea, and cannot be addressed absent a certificate of probable cause. (*Panizzon, supra*, at p. 78 [“by contesting the constitutionality of the very sentence he negotiated as part of the plea bargain, defendant is, in substance, attacking the validity of the plea”].)

The judgment is affirmed.

Pollak, P.J.

We concur:

Tucher, J.
Brown, J.